

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Petition for Waiver of
Kirby Lester, LLC

CG Docket No. 02-278

CG Docket No. 05-338

PETITION FOR RETROACTIVE WAIVER

Pursuant to Section 1.3 of the Commission's rules and the Commission's recent *Order* in CG Docket Nos. 02-278, 05-338, (the "*Order*"),¹ Petitioner Kirby Lester, LLC ("Kirby Lester"),² by its counsel, hereby requests that the Commission grant a retroactive waiver of Section 64.1200(a)(4)(iv) of the Commission's rules, with respect to alleged advertising faxes sent by Kirby Lester with the recipients' prior express invitation or permission. 47 C.F.R. § 64.1200(a)(4)(iv).

The *Order* clarified that the opt-out notice requirement under the Telephone Consumer Protection Act (the "TCPA"), set forth in 47 U.S.C. § 227(b)(1)(C) and (2)(d) of the statute, and in the implementing regulation, 47 C.F.R. § 64.1200(a)(4)(iv), applies to solicited fax advertisements (i.e., fax advertisements sent with the recipients' prior express invitation or permission). However, the Commission granted a retroactive waiver of Section 64.1200(a)(4)(iv) to several petitioners who were facing lawsuits alleging that the petitioners had violated Section 64.1200(a)(4)(iv) by failing to include sufficient "opt-out" language in advertising faxes. The Commission determined that, because of potential confusion regarding whether the opt-out

¹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005; Application for Review filed by Anda, Inc.; Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Out Requirement for Faxes Sent with the Recipient's Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, ¶ 30 FCC 14-164 (rel. October 30, 2014) ("*Order*").

² Kirby Lester is a limited liability company headquartered in Lake Forest, Illinois.

language was required in solicited fax advertisements, good cause supported a retroactive waiver, and that a waiver was in the public interest. *See Order* ¶¶ 26-28. The Commission invited “similarly-situated parties” to seek retroactive waivers of the opt-out requirement with respect to solicited advertising faxes. *See id.* ¶ 30.

As Kirby Lester demonstrates below, it is similarly-situated to the petitioners who were granted retroactive waivers in the *Order*. Kirby Lester respectfully requests that the Commission grant it a retroactive waiver of Section 64.1200(a)(4)(iv) for the same reasons that supported the Commission’s retroactive waivers in the *Order*.

I. FACTUAL BACKGROUND

Since 1971, Kirby Lester has played a pioneering role in pharmacy technology. Kirby Lester sells world-renowned tablet counters/pill counters, systems that feature the latest in efficiency and dispensing safety like cassettes that automatically double-count, workflow software, onscreen drug imaging, order tracking, pharmacy management system interfacing, and other features previously only available on more expensive and complicated systems. Kirby Lester offers a full line of durable tablet counting and bottle filling systems for settings as diverse as pharmaceutical and supplement manufacturing, agriculture, and even law enforcement. In connection with these offerings, Kirby Lester also provides important information about its products and services via facsimile to those of its customers who have *consented* to receive such communications.

The TCPA, enacted in 1991, prohibits the use of a fax machine to send an “unsolicited advertisement.”³ In 2005, Congress enacted the *Junk Fax Prevention Act* (“JFPA”) to “require the sender of an unsolicited fax advertisement to provide specified notice and contact

³ 47 U.S.C. § 227(b)(C)(i). The term “unsolicited advertisement” means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission, in writing or otherwise. 47 U.S.C. § 227(a)(5).

information on the fax that allows recipients to ‘opt out’ of any future fax transmissions from the sender.” Junk Fax Protection Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005), codified at 47 U.S.C. § 227. Because Section 227(b) expressly applies to “unsolicited” fax advertisements, Kirby Lester did not believe that that any of its solicited facsimiles required opt-out notices. However, as a consequence of this regulatory uncertainty, Kirby Lester – like many other companies operating in the healthcare industry – now finds itself a defendant in a putative class action lawsuit filed in federal court which alleges, among other things, violations of the TCPA.

On January 23, 2015, Kirby Lester was sued in the U.S. District Court for the Northern District of Illinois by Rhea Drugstore in a putative class action matter alleging violations of the TCPA captioned *Rhea Drugstore, Inc. individually and on behalf of all others similarly situated v. Kirby Lester, LLC*, Case No. 15-710. (A copy of this Complaint is included herein as Attachment A).⁴ This is the first time that Kirby Lester has faced a TCPA action. The Complaint alleges that Plaintiff received two faxes from Kirby Lester which did not have opt out notices. However, it is Kirby Lester’s position that the faxes were not “unsolicited” and that the faxes at issue did, in fact, include opt out notices. However, as with many of the other petitioners in the *Order*, the opt out notice was allegedly insufficient because it failed to track, *verbatim*, the language set forth in Section 64.1200(a)(4)(iii). According to Rhea Drugstore, that should subject Kirby Lester to significant liability.

II. PROCEDURAL HISTORY

The TCPA prohibits the use of any telephone facsimile machine, computer, or other device to send an “unsolicited advertisement” to a fax machine. 47 U.S.C. § 227(b)(1)(C). The TCPA was amended in 2005 by the JPFA, which, among other things, codified an exception to the TCPA’s prohibition on unsolicited advertising faxes for companies that send fax

⁴ The copies of the faxes included in Plaintiff’s complaint as Exhibits A and B are not accurate representations of the subject faxes as they were truncated. The complete faxes are attached hereto as Attachment B. Notably, a phone number and fax number are provided for any recipients who desired to opt out of future transmissions.

advertisements to those with whom they have an established business relationship. 47 U.S.C. § 227(b)(1)(C)(i). The JFPA also amended the TCPA to require the sender of an “unsolicited advertisement” to provide a specified notice on the fax that allows recipients to “opt out” of any future fax transmissions from the sender. *See id.* §§ 227(b)(1)(C)(iii) and 227(b)(2)(D).

The Commission amended its rules to incorporate the changes in the JFPA in 2006. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Protection Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 (2006) (the “Junk Fax Order”). Among other things, in the Junk Fax Order, the Commission adopted a rule that provided that a fax advertisement “sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice.” 47 C.F.R. § 64.1200(a)(4)(iv). The Junk Fax Order, however, also stated in a footnote that “the opt-out notice requirement only applies to communications that constitute unsolicited advertisements.” Junk Fax Order, 21 FCC Rcd at 3810 n.154. Numerous parties filed petitions challenging the Commission’s rule applying the opt-out notice requirement to solicited advertising faxes. As noted, the Commission resolved those petitions in the *Order*, issued on October 30, 2014.

III. KIRBY LESTER IS A SIMILARLY SITUATED PARTY TO THE PETITIONERS IN THE *ORDER* AND SHOULD ALSO BE GRANTED A RETROACTIVE WAIVER OF OF 47 C.F.R. § 64.1200(A)(4)(IV)

In the *Order*, the Commission acknowledged that the “inconsistent footnote” in the Junk Fax Order (which stated that the opt-out notice requirement applied only to unsolicited advertisements) “caused confusion or misplaced confidence regarding the applicability of the [opt-out notice] requirement.” *Order* ¶¶ 24, 28. The Commission also recognized that “the lack of explicit notice” in the notice of proposed rulemaking that the Commission contemplated requiring opt-out notices on solicited fax advertisements “may have contributed to confusion or misplaced confidence.” *Id.* ¶ 25.

The Commission stated that “this specific combination of factors presumptively establishes good cause for retroactive waiver of the rule.” *Order* ¶ 26. The Commission found that “granting a retroactive waiver would serve the public interest,” because it would be “unjust or inequitable” to subject parties to “potentially substantial damages,” given the confusion and misplaced confidence about the rule’s applicability. *Id.* ¶¶ 27, 28. Further, the Commission “grant[ed] retroactive waivers of [its] opt-out requirement to certain fax advertisement senders to provide these parties with temporary relief from any past obligation to provide the opt-out notice to such recipients required by [its] rules.” *Order* ¶ 29. The Commission stated that “[o]ther, similarly situated parties may also seek waivers such as those granted” in the *Order*, within six months of the date of the *Order*. *Id.* ¶ 30.

This petition for waiver does not ask the Commission to resolve the factual and legal questions raised in the pending litigation; these issues are properly before the district court. By this filing, Kirby Lester seeks only to obtain the same retroactive waiver of the opt-out rule in 47 C.F.R. § 64.1200(a)(4)(iv) that the Commission granted to multiple petitioners in the *Order*. As demonstrated herein, Kirby Lester is similarly-situated to the parties who were granted retroactive waivers in the *Order*, and the Commission likewise should grant Petitioners a retroactive waiver of the opt-out notice requirement of 47 C.F.R. § 64.1200(a)(4)(iv) as applied to alleged advertising faxes sent to recipients who had provided prior express invitation or permission for such faxes. The FCC’s rationale in granting retroactive waivers to the petitioners referenced above applies equally to Kirby Lester as it too is a defendant in a putative class action lawsuit in which its alleged failure to comply with the Section 64.1200(a)(4)(iv) of the rules has the potential to expose it to monetary damage awards. The Commission has acknowledged that substantial confusion previously existed with respect to the opt-out requirements for solicited fax advertisements. Thus, not only does good cause exist to grant Kirby Lester a waiver, but such a grant would be in the public interest.

For all of these reasons, Petitioner Kirby Lester respectfully request that the Commission grant it the same retroactive waiver of Section 64.1200(a)(4)(iv) that the Commission already has granted to other, similarly-situated parties.

KIRBY LESTER, LLC

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Its Attorneys

Dated: March 16, 2015

ATTACHMENT A

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RHEA DRUGSTORE, INC.,
individually and on behalf of
all others similarly situated,

PLAINTIFF

v.

CASE NO. _____

KIRBY LESTER, LLC,

DEFENDANT

JURY TRIAL DEMANDED

CLASS ACTION COMPLAINT

Plaintiff, Rhea Drugstore, Inc. (herein "Plaintiff"), on behalf of itself and all other similarly situated, brings this Complaint against Kirby Lester, LLC ("Defendant") for violations of the Telephone Consumer Protection Act. Plaintiff seeks certification of its claims against Defendant as a class action. In support thereof, Plaintiff states as follows:

INTRODUCTION

1. This case challenges Defendant's policy and practice of faxing unsolicited advertisements without providing an opt-out notice as required by law.

2. Congress enacted the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, to regulate the fast-growing expansion of the telemarketing industry. As is pertinent here, the TCPA and its implementing regulations prohibit persons within the United States from sending advertisements via fax without including a

detailed notice that allows recipients to expeditiously opt out of receiving future solicitations.

3. Junk faxes disrupt recipients' peace, drain recipients' paper, ink, and toner, and cause recipients tangible damages. Junk faxes also cause recipients to waste valuable time retrieving and discerning the purpose of the faxes; prevent fax machines from receiving and sending authorized faxes; and cause undue wear and tear on recipients' fax machines. Plaintiff is a pharmacy that must use its fax machine to receive communications about medical patients. That purpose is impeded when Plaintiff's fax machine is invaded by junk faxes.

4. The TCPA provides a private right of action and statutory damages of \$500 per violation, which may be trebled when the violation is willing or knowing.

5. On behalf of itself and all others similarly situated, Plaintiff brings this case to recover damages for violations of the TCPA and to enjoin Defendant from future TCPA violations.

JURISDICTION AND VENUE

6. This Court has subject-matter jurisdiction under 28 U.S.C. § 1331.

7. Venue in this district is proper because this is the district in which Defendant resides.

PARTIES

8. Plaintiff, Rhea Drugstore, Inc., is a family-owned pharmacy located in Little Rock, Arkansas.

9. Defendant Kirby Lester, LLC, is a company that sells automation technology to pharmacies. It has its principal place of business in Lake Forest, Illinois, and is organized under the laws of Delaware.

FACTS

10. On November 21, 2014, Defendant sent an unsolicited advertisement to Plaintiff's ink-and-paper facsimile machine. The fax advertises the tax benefits of purchasing one of Defendant's pill-counting machines. It asks, "Has your accountant mentioned you could use a tax shelter?" It then informs the recipient that "[i]f you lease or purchase any Kirby Lester system by Dec. 31 and take advantage of the Section 179 deduction, your total savings can be significant." At the bottom of the form is a tear-off sheet that the recipient may return for Defendant to "[c]ontact me about tax savings with Kirby Lester dispensing technology." A copy of this facsimile is attached hereto and marked as Exhibit A.

11. On December 17, 2014, Defendant sent an unsolicited advertisement to Plaintiff's ink-and-paper facsimile machine. The fax advertises the tax benefits of purchasing one of Defendant's pill-counting machines. The fax touts the pill counter as follows: "A Kirby Lester device makes the perfect tax write-off. Not very expensive. Installable this year. Significant tax advantages (a minimum of \$2,200). And immediately improve your workflow with dispensing." At the bottom of the form is a tear-off sheet that the recipient may return for Defendant to "[c]ontact me about tax savings with Kirby Lester dispensing technology." A copy of this facsimile is attached hereto and marked as Exhibit B.

12. Exhibits A and B are exemplary of the junk faxes Defendant sends.

13. Defendant did not have Plaintiff's prior express invitation or permission to send advertisements to Plaintiff's fax machine.

14. Defendant's faxes do not contain opt-out notices that comply with the requirements of the TCPA.

CLASS ALLEGATIONS

15. In accordance with Fed. R. Civ. P. 23, Plaintiff brings this action under the Telephone Consumer Protection Act, 47 U.S.C. § 227, on behalf of the following class of persons (the "Class"):

All persons and entities who hold telephone numbers that received a facsimile transmission from Defendant at any time from January 23, 2011, to present (the "Class Period") that 1) promotes Defendant's products and 2) lacks an opt-out notice compliant with the requirements of the TCPA.

16. Plaintiff reserves the right to modify or amend the definition of the proposed Class before the Court determines whether certification is proper.

17. Excluded from the Class are Defendant, any parent, subsidiary, affiliate, or controlled person of Defendant, as well as the officers, directors, agents, servants, or employees of Defendant and the immediate family members of any such person. Also excluded are any judge who may preside over this case and any attorneys representing Plaintiff or the Class.

18. Numerosity [Fed R. Civ. P. 23(a)(1)]. The class is so numerous that joinder is impractical. Upon information and belief, Defendant has sent illegal fax advertisements to hundreds if not thousands of other recipients.

19. Commonality [Fed. R. Civ. P. 23(a)(2)]. Common questions of law and fact apply to the claims of all Class members and include (but are not limited to) the following:

(a) Whether Defendant sent faxes advertising the commercial availability of property, goods, or services;

(b) The manner and method Defendant used to compile or obtain the list of fax numbers to which it sent Exhibits A and B and other fax advertisements;

(c) Whether Defendant faxed advertisements without first obtaining the recipient's prior express permission or invitation;

(d) Whether Defendant's advertisements contained the opt-out notice required by law;

(e) Whether Defendant sent the fax advertisements knowingly or willfully;

(f) Whether Defendant violated 47 U.S.C. § 227;

(g) Whether Plaintiff and the other members of the Class are entitled to statutory damages; and

(h) Whether the Court should award treble damages.

20. Typicality [Fed. R. Civ. P. 23(a)(3)]. Plaintiff's claims are typical of the claims of all Class members. Plaintiff received an unsolicited fax advertisement from Defendant during the Class Period. Plaintiff makes the same claims that it makes for the Class members and seeks the same relief that it seeks for the Class

members. Defendant has acted in the same manner toward Plaintiff and all the Class members.

21. Fair and Adequate Representation [Fed. R. Civ. P. 23(a)(4)]. Plaintiff will fairly and adequately represent and protect the interests of the Class. It is interested in this matter, has no conflicts, and has retained experienced class counsel to represent the Class.

22. Predominance and Superiority [Fed. R. Civ. P. 23(b)(3)]. For the following reasons, common questions of law and fact predominate and a class action is superior to other methods of adjudication:

(a) Proof of Plaintiff's claims will also prove the claims of the Class without the need for separate or individualized proceedings;

(b) Evidence regarding defenses or any exceptions to liability that Defendant may assert will come from Defendant's records and will not require individualized or separate inquiries or proceedings;

(c) Defendant has acted and continues to act pursuant to common policies or practices in the same or similar manner with respect to all Class members;

(d) The amount likely to be recovered by individual Class members does not support individual litigation. A class action will permit a large number of relatively small claims involving virtually identical facts and legal issues to be resolved efficiently in one proceeding based on common proofs.

(e) This case is inherently well-suited to class treatment in that:

(i) Defendant identified persons or entities to receive its fax transmissions, and it is believed that Defendant's computer and business records will enable Plaintiff to readily identify class members and establish liability and damages;

(ii) Common proof can establish Defendant's liability and the damages owed to Plaintiff and the Class;

(iii) Statutory damages are provided for in the statute and are the same for all Class members and can be calculated in the same or a similar manner;

(iv) A class action will result in an orderly and expeditious administration of claims, and it will foster economies of time, effort, and expense;

(v) A class action will contribute to uniformity of decisions concerning Defendant's practices;

(vi) As a practical matter, the claims of the Class are likely to go unaddressed absent class certification.

CAUSE OF ACTION

Violations of the Telephone Consumer Protection Act 47 U.S.C. § 227(b)(1)(C) and 47 C.F.R. § 64.1200(a)(4)

23. The TCPA provides strict liability for sending fax advertisements in a manner that does not comply with the statute. Recipients of fax advertisements have a private right of action to seek an injunction or damages for violations of the TCPA and its implementing regulations. 47 U.S.C. § 227(b)(3).

24. The TCPA makes it unlawful to send any “unsolicited advertisement” via fax unless certain conditions are present. 47 U.S.C. § 227(b)(1)(C). “Unsolicited advertisement” is defined as “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission, in writing or otherwise.” 47 U.S.C. § 227(a)(5).

25. Unsolicited faxes are illegal if the sender and recipient do not have an “established business relationship.” 47 U.S.C. § 227(b)(1)(C)(i). “Established business relationship” is defined as “a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.” 47 U.S.C. § 227(a)(2); 47 C.F.R. § 64.1200(f)(6).

26. Regardless of whether the sender and recipient have an established business relationship, and regardless of whether the fax is unsolicited, a faxed advertisement is illegal unless it includes an opt-out notice on its first page that complies with the TCPA’s requirements. *See* 47 U.S.C. § 227(b)(1)(C)(iii); 47 C.F.R. § 64.1200(a)(4)(iv). To comply with the law, an opt-out notice must (1) inform the recipient that the recipient may opt out of receiving future faxes by contacting the sender; (2) provide both a domestic telephone number and a facsimile machine

number—one of which must be cost-free—that the recipient may contact to opt out of future faxes; and (3) inform the recipient that the sender's failure to comply with an opt-out request within thirty days is a violation of law. *See* 47 U.S.C. § 227(b)(2)(D); 47 CFR § 64.1200(a)(4)(iii).

27. Defendant faxed unsolicited advertisements to Plaintiff that did not have compliant opt-out notices, in violation of 47 U.S.C. § 227(b)(1)(C) and 47 C.F.R. § 64.1200(a)(4).

28. Defendant knew or should have known (a) that Plaintiff had not given express invitation or permission for Defendant to fax advertisements about its products; (b) that Defendant's faxes did not contain a compliant opt-out notice; and (c) that Exhibits A and B are advertisements.

29. Defendant's actions caused damage to Plaintiff and the Class members. Defendant's junk faxes caused Plaintiff and the Class members to lose paper, toner, and ink consumed in the printing of Defendant's faxes through Plaintiff's and the Class members' fax machines. Defendant's faxes cost Plaintiff and the Class members time that otherwise would have been spent on Plaintiff's and the Class members' business activities.

REQUEST FOR RELIEF

WHEREFORE Plaintiff, individually and on behalf of all others similarly situated, respectfully requests that this Court:

a) determine that this action may be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure;

- b) award damages for each violation in the amount of actual monetary loss or \$500, whichever is greater, and treble those damages;
- c) enjoin Defendant from additional violations; and
- d) grant such other legal and equitable relief as the Court may deem appropriate, including costs and attorney's fees.

JURY DEMAND

Plaintiff and the Class members hereby request a trial by jury.

Dated: January 23, 2015

Respectfully submitted,

s/ Hank Bates

HANK BATES

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Counsel for Plaintiff and Proposed Class

EXHIBIT A

Show this
to your
accountant

Your Last Chance for significant tax savings

Get a full 2014 tax break now before Sec. 179 expires



Tax break up to \$2,200
on the best-selling KL1
tablet counter

Has your accountant mentioned you could use a tax shelter? Don't miss this opportunity to save a substantial amount of money this year, not to mention improve your pharmacy's dispensing efficiency.

If you lease or purchase any Kirby Lester system by Dec. 31 and take advantage of the Section 179 deduction, your total savings can be significant. Not sure? Just ask your tax advisor or accountant.



You need to hurry!
On Dec. 31, your
full Section 179
tax incentive
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Contact Kirby Lester at
sales@kirbylester.com or 800.641.3961



KirbyLester
exactly.

Yes! Contact me about tax savings with Kirby Lester dispensing technology

Pharmacy _____

Your Name _____

Phone _____

E-Mail _____

Fax back to 847.984.3366

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Always consult with your
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EXHIBIT B

**Tax Benefits
in 2014**

Attention: Pharmacy Owner and Accountant

You still have time for a 2014 tax deduction

Ask your accountant one question: "Would a deduction this year help my 2014 taxes?"

A Kirby Lester device makes the perfect tax write-off. Not very expensive. Installable this year. Significant tax advantages (a minimum of \$2,200). And immediately improve your workflow with dispensing.

The federal tax program is called Section 179. It's real tax relief, and Kirby Lester devices are fully qualified. Ask your accountant for more details.

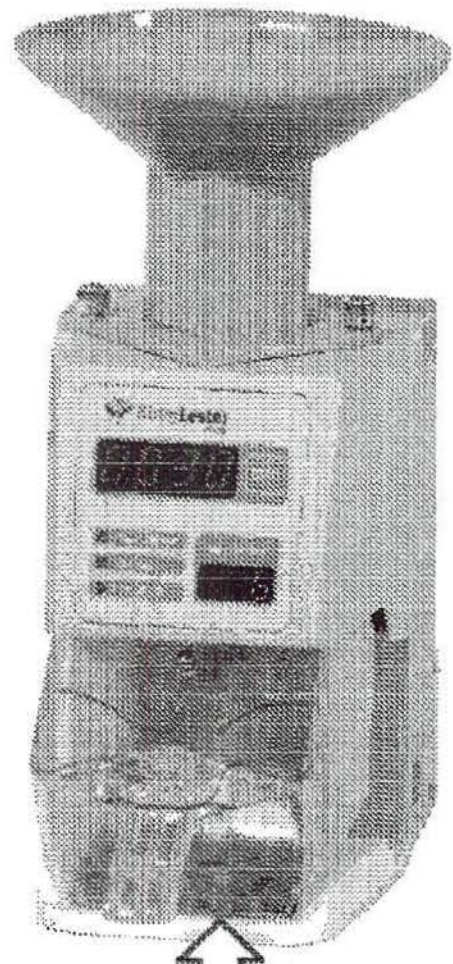


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